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13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**

15 OUTERBRIDGE ACCESS
16 ASSOCIATION, SUING ON BEHALF OF
17 DIANE CROSS; and DIANE CROSS, An
18 Individual,

19 Plaintiff,

20 vs.

21 MARIE CALLENDER'S PIE SHOPS,
22 INC. d.b.a. MARIE CALLENDER'S #254;
23 PACIFIC BAGELS, LLC d.b.a.
24 BRUEGGARS BAGELS; COURTYARD
25 HOLDINGS, LP; PSS PARTNERS, LLC;
26 AND DOES 1 THROUGH 10, Inclusive,

27 Defendants.

Case No. 07-CV-2129 BTM (AJB)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION FOR
ORDER DECLINING
SUPPLEMENTAL JURISDICTION**

*[Notice of Motion, Request for Judicial
Notice and Appendix of Foreign
Authorities filed concurrently herewith]*

Date: March 28, 2008

Time: 11:00 a.m.

Ctrm: 15

****Per Chambers, no oral argument unless
required by the court.***

Complaint Filed: November 7, 2007

Trial Date: None Set

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Outerbridge Access Association (“Outerbridge”) and Diane Cross’s (collectively, “Plaintiffs”) amended complaint, one of nearly two dozen lawsuits they have jointly filed in this District, targeted an entire shopping center containing, among other things, a Marie Callender’s restaurant located at 11122 Rancho Carmel Drive, San Diego, California (“Restaurant”). Plaintiffs have brought this most recent action on behalf of an entire putative class of mobility-impaired individuals with respect to various alleged technical violations of the ADA, however *de minimis*. (See, e.g. RJN Exh. 1, First Amended Complaint (“FAC”) ¶¶ 16, 17).

While the current state of the case law emboldens Plaintiffs to sue to each and every alleged technicality, regardless of whether they encountered it and regardless of whether the alleged violation, if it even exists, would pose any difficulty to them whatsoever, case law in this District is nearly unanimous that the practice of pursuing state disability claims in the district court clearly poses “novel or complex issues of state law” that are best suited for resolution within the state court system. See, e.g., *Cross v. Plaza Park Inv., L.P.*, 2007 WL 951772 * 6 (S.D. Cal. 2007). Accordingly, Marie Callender’s respectfully requests that the Court decline to exercise supplemental jurisdiction over Plaintiffs’ state disability claims.

II. FACTUAL BACKGROUND

On or about November 7, 2007, Plaintiffs filed this Complaint against Marie Callender’s and every other establishment within the same shopping center, seeking statutory damages and injunctive relief on behalf of Cross and other alleged members of Outerbridge for alleged ADA violations at the Restaurant. Cross, the only named Plaintiff, claims to be a wheelchair-bound individual residing in an unknown location.

1 Plaintiff Outerbridge is an entity of unknown form whose primary (and likely only)
2 purpose appears to be ADA litigation. (FAC ¶ 12).

3
4 Plaintiffs' Complaint alleges causes of action under the ADA as well as state
5 statutes based on several generically alleged potential ADA violations throughout the
6 shopping center. Although Plaintiffs do not claim that any alleged barrier to access
7 actually prevented or deterred them from enjoying their dining experience at the
8 Restaurant, they nevertheless seek treble damages and injunctive relief based on these
9 and other possible ADA violations. (FAC, Demand For Judgment For Relief).
10 Plaintiffs do not even make an attempt to tailor the relief they seek to the remediation of
11 barriers impacting wheelchair-bound individuals, as Cross purports to be (while
12 Outerbridge claims that it has hearing-impaired members, no one in particular is
13 identified). Instead, based on a list of potential architectural access issues, they seek to
14 render the Court the de facto architect and master designer for the Restaurant.

15
16 **III. THIS COURT SHOULD DECLINE SUPPLEMENTAL JURISDICTION**
17 **OVER PLAINTIFFS' STATE DISABILITY CLAIMS BECAUSE THEY**
18 **RAISE NOVEL AND COMPLEX ISSUES OF STATE LAW**

19 The overwhelming precedent of published opinions such as *Organization for the*
20 *Advancement of Minorities with Disabilities v. The Brick Oven Rest.*, 406 F.Supp.2d
21 1129 (S.D. Cal. 2005), *Wilson v. PFS, LLC*, 493 F. Supp. 2d 1122 (S.D. Cal. 2007),
22 *Molski v. Mandarin Touch Rest.*, 359 F.Supp.2d 924, 936 (C.D. Cal. 2005), and *Molski*
23 *v. Kahn Winery*, 381 F.Supp.2d 1209, 1211 (C.D. Cal. 2005) have held that Unruh Act
24 and Disabled Persons Act claims present novel and complex issues of state law and
25 declined to exercise supplemental jurisdiction over them for that reason. Similarly, the
26 judicial trend in this District since *Gunther v. Lin*, 50 Cal. Rptr. 317 (2006), is to
27 dismiss state disability claims at the outset of the lawsuit since *Gunther* illustrates, in
28 great detail, the "irreconcilable tension between the ADA and the Unruh Act . . . [and]

1 that federal and state interpretation of the Unruh Act have diverged to such a degree that
 2 declining supplemental jurisdiction is appropriate in this case.” *Cross v. Pac. Plaza Inv.*
 3 at *5; *see also Morgan v. American Stores Co., LLC*, 2007 WL 1971945 * 2 (S.D. Cal.
 4 2007) (“*Gunther*, decided after *Brick Oven Restaurant*, shows that the comity interests
 5 have become more, not less, compelling over time as the courts struggle to resolve what
 6 is at the moment an irreconcilable tension between the ADA and the Unruh Act.”);
 7 *Pinnock v. Java Depot, Inc.*, 2007 WL 2462106 (S.D. Cal. 2007) (same); *Oliver v.*
 8 *GMRI, Inc.*, 2007 WL 4144995 (S.D. Cal. 2007) (“*Gunther* plainly holds that a plaintiff
 9 seeking damages under [the Unruh Act] must show intentional discrimination. Faced
 10 with this conflicting authority, courts of this district have almost uniformly concluded
 11 that it is appropriate to decline supplemental jurisdiction.”); *Tripple AAA v. Del Taco,*
 12 *Inc. et al.*, Case No. 06cv2199 DMS-WMC, February 26, 2007 Order Granting in Part
 13 Motion to Dismiss at 11:23-27 (same) (RJN Exh. 2).

14
 15 While Marie Callender’s recognizes that this Court issued the outlying opinion in
 16 *Pinnock v. Solana Beach Do it Yourself Dog Wash*, 2007 WL 1989635 * 3 (S.D. Cal.
 17 2007), it too recognized that the *Gunther* ruling “present[ed] a situation in which the
 18 pendent state law claims raise a novel or complex issue of state law,” but then found
 19 that other concerns of economy, convenience, fairness and comity were best satisfied by
 20 retaining jurisdiction at that time. Nevertheless, the Court suggested that the defendants
 21 could revisit the issue “in the event that the circumstances of this Court’s jurisdiction
 22 should change.” *Id.*

23
 24 However, this case presents a different scenario from the arguments raised in the
 25 defendants’ analogous motion in *Solana Beach* in that there is more than one business
 26 entity still involved, each of which may later address Plaintiffs’ allegations by (1)
 27 arguing that the alleged barriers are moot; (2) arguing that the alleged barriers do not
 28 exist; (3) doing nothing; or (4) a combination of these strategies. Assuming the Court

1 found that the ADA claims were moot as to one defendant down the line, the reasoning
2 of *Solana Beach* would only pose further complexity, where less than all of the parties
3 can successfully show that the ADA claim is moot and ask this Court to decline
4 supplemental jurisdiction over the other claims.

5
6 Certainly the more efficient strategy in this putative class action is to dismiss the
7 state claims at the outset. First of all, doing so would hardly inconvenience the parties,
8 who could all fully litigate these matters in state court at the same time. Any other
9 conclusion would necessarily pose complexities and additional expense down the line.
10 Accordingly, Marie Callender's urges the Court to follow the resounding weight of
11 authority in this District declining to exercise supplemental jurisdiction – especially
12 where, as here, Plaintiffs have not and cannot articulate any prejudice that would result
13 if they were simply forced to bring their state disability claims in San Diego Superior
14 Court. To the contrary, dismissal at this time would promote efficiency and certainty,
15 since the parties could effectively plot their litigation strategies and defenses from the
16 outset, as opposed to the potential of reconstructing their arguments down the line to
17 properly address the discrimination aspect of the Unruh Act depending on what court is
18 ruling on that claim. *See, e.g., Oliver v. GMRI, Inc.* at * 3 (“If this Court maintains
19 jurisdiction over Plaintiff's state law claims, the Court will be bound by *Lentini* to allow
20 Plaintiff to recover damages under the Unruh Act without any showing of intentional
21 discrimination. However, if Plaintiff had filed this case in the San Diego County
22 Superior Court, that court would be bound by *Gunther* to deny relief unless Plaintiff
23 showed intent.”). Second, a unanimous confirmation of this issue by the Court would
24 actually promote overall judicial economy, as a clear decision once and for all would
25 relieve this District from having to analyze it anew in every post-*Gunther* opinion.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, Marie Callender's respectfully requests that the Court
3 grant this Motion in its entirety and enter an order dismissing the state disability claims
4 against all defendants without prejudice to Plaintiffs' ability to seek relief for them in
5 state court.

6
7 Dated: January 28, 2008

CALL, JENSEN & FERRELL
A Professional Corporation
SCOTT J. FERRELL
LISA A. WEGNER

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11 By: /s/Lisa A. Wegner
12 Attorneys for Defendant Marie Callender's
13 Pie Shops, Inc. d.b.a. Marie Callender's #254
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CERTIFICATE OF SERVICE
(United States District Court)

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 610 Newport Center Drive, Suite 700, Newport Beach, CA 92660.

On January 30, 2008, I have served the foregoing document described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR ORDER DECLINING SUPPLEMENTAL JURISDICTION** on the following person(s) in the manner(s) indicated below:

SEE ATTACHED SERVICE LIST

☒ (BY ELECTRONIC SERVICE) I am causing the document(s) to be served on the Filing User(s) through the Court's Electronic Filing System.

☐ (BY MAIL) I am familiar with the practice of Call, Jensen & Ferrell for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. On this date, a copy of said document was placed in a sealed envelope, with postage fully prepaid, addressed as set forth herein, and such envelope was placed for collection and mailing at Call, Jensen & Ferrell, Newport Beach, California, following ordinary business practices.

☐ (BY OVERNIGHT SERVICE) I am familiar with the practice of Call, Jensen & Ferrell for collection and processing of correspondence for delivery by overnight courier. Correspondence so collected and processed is deposited in a box or other facility regularly maintained by the overnight service provider the same day in the ordinary course of business. On this date, a copy of said document was placed in a sealed envelope designated by the overnight service provider with delivery fees paid or provided for, addressed as set forth herein, and such envelope was placed for delivery by the overnight service provider at Call, Jensen & Ferrell, Newport Beach, California, following ordinary business practices.

☐ (BY FACSIMILE TRANSMISSION) On this date, at the time indicated on the transmittal sheet, I transmitted from a facsimile transmission machine, which telephone number is (949) 717-3100, the document described above and a copy of this declaration to the person, and at the facsimile transmission telephone numbers, set forth herein. The above-described transmission was reported as complete and without error by a properly issued transmission report issued by the facsimile transmission machine upon which the said transmission was made immediately following the transmission.

☐ (BY E-MAIL) I transmitted the foregoing document(s) by e-mail to the addressee(s) at the e-mail address(s) indicated.

1
2 ☒ (FEDERAL) I declare that I am a member of the Bar and a registered Filing User
3 for this District of the United States District Court.

4 I declare under penalty of perjury under the laws of the United States of America
5 that the foregoing is true and correct, and that this Certificate is executed on January 30,
6 2008, at Newport Beach, California.

7 s/Lisa A. Wegner
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